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FOR ARGUMENT

In the Supreme Court of the United States

October Term, 1978
No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE,
Petitioner,

v.

FRANCES B. DAVIS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

78-711

BRIEF OF AMICUS CURIAE OF THE STATE OF CALIFORNIA IN SUPPORT OF THE RESPONDENT

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AUTHORITY TO FILE AMICUS CURIAE BRIEF

The State of California by its Attorney General, George Deukmejian, respectfully submits this brief on behalf of the State of California as *amicus curiae* under the authority of Rule 42(4), United States Supreme Court Rules. This brief is submitted in support of the respondent Frances B. Davis.

INTEREST OF AMICUS CURIAE

In California "[t]he opportunity to seek, obtain and hold employment without discrimination because of . . . physical handicap . . . is . . . recognized as and declared to be a civil right." (Cal. Lab. Code § 1412).[1] California's strong public policy of eliminating barriers to equal opportunities for handicapped persons is also expressed in numerous legislative enactments. For example, California Government Code section 19230 declares that "[it] is the policy of this state to encourage and enable disabled persons to participate fully in the social and economic life of the state and to engage in remunerative employment." California Civil Code sections 54 through 55.1 establish that physically disabled persons have "full and free use of the streets, highways, sidewalks, walkways, public buildings, public facilities and other public places." (Cal. Civ. Code § 54.) California Government Code sections 4450 *et seq.* establish minimum standards to facilitate access to public buildings by physically handicapped persons and California Health and Safety Code sections 19955 *et seq.* ensure that such standards apply to public accommodations constructed with private funds. Also, rapid transit equipment and structures must be built so as to be accessible to handicapped persons. (Cal. Gov. Code § 4500.)

Additionally, there are numerous federally funded programs and activities in California which may be

[1] See also, *Purdy & Fitzpatrick v. State of California* (1969) Cal.2d 566, 579 [79 Cal. Rptr. 77] ("Limitations on this right to work may be sustained only after the most careful scrutiny"); and *Serrano v. Priest* (1971) 5 Cal.3d 584, 604-608 [96 Cal. Rptr. 60] ("Education is a fundamental right.")

affected by this Court's decision.[2] California is vitally concerned that these programs and activities be efficiently administered in a manner that will discourage stereotyping of and encourage equal opportunities for handicapped individuals.

It is in accordance with these well established policies that the Attorney General of the State of California files this brief in support of the respondent.

STATEMENT OF THE FACTS

Amicus offers this summary of the key facts indicated in the lower courts' opinions:

Respondent, Frances B. Davis ("Davis") has been a duly qualified Licensed Practical Nurse in the State of North Carolina since 1967. During the 1973-74 academic year, Davis successfully completed the College Parallel program (designed as preparatory for entrance into the Associate Degree Nursing Program) at Southeastern Community College ("College"), a public institution which receives federal funds, (*Davis v. Southeastern Community College* (E.D. N.C. 1976) 424 F. Supp. 1341, 1342.)

Davis applied for and was denied admission to the Nursing Program on the basis that her hearing impairment [3]

[2] *E.g.*, the state university, college and community college system, student assistance grants and loans, low income housing assistance, revenue sharing SSI/SSP, and Medicaid, and regulation of nursing homes and hospitals.

[3] The audiologist's report indicated that Davis has a moderately severe loss in the right ear and a severe hearing loss in the left ear. She wears a hearing aid which improves her hearing to the outer limits of normal hearing levels and is well aware of gross sounds occurring around her. She is skillful in communicating with other people if she wears her hearing aid and is allowed to use her vision to aid her in interpreting the speech of others. (*Davis, supra,* 424 F. Supp. at 1343.)

disqualified her for the program. The single major factor in the College's refusal to allow admission to Davis was "*their feelings*" that she would be unable to serve as a Registered Nurse on completion of such a program." (*Id.* at 1343-1346, emphasis added.)

The trial court ruled against Davis' claims that the College had denied her equal protection of the law and due process in refusing her admission to the nursing program and held that although Davis is a "handicapped person" within the protection of 29 U.S.C. § 794 ("Section 504"), she was not subjected to discrimination under the statute because her hearing disability prevented her from being "otherwise qualified" for admission.[4]

The Court of Appeal vacated and remanded the trial court's judgment holding that the district court erred when it found that Davis was not "otherwise qualified" pursuant to Section 504 and further held that the College must reconsider Davis' application without regard to her hearing disability.[5] (*Davis v. Southeastern Community College* (4th Cir. 1978) 574 F.2d 1158, 1160.)

INTRODUCTION AND SUMMARY OF ARGUMENT

There are more than 13 million deaf or hearing impaired

[4]The trial court also held it was unnecessary to determine whether Davis was required to exhaust all administrative remedies, when even if she had additional administrative remedies, resort thereto would have proved futile. (*Davis, supra,* 424 F. Supp. at 1344.)

[5]The Fourth Circuit also held that Davis could pursue a private right of action under § 504 and affirmed the trial court's holding that administrative exhaustion would have been futile. (*Davis, supra,* 574 F.2d at 1160.) The Court of Appeal did not reach the constitutional questions. (*Id.* at 1161.) The appellate court also directed the trial court to consider Davis' claim that the College could be required to modify its nursing program so as to accommodate her and her hearing disability. (*Id.* at 1162.)

people nationwide.[6] Like other handicapped persons those with hearing disabilities have traditionally been subjected to discriminatory admissions policies and practices by colleges and universities. The purpose of Section 504 is to eradicate handicap discrimination by institutions receiving federal financial assistance and to ensure handicapped individuals equal access to all programs offered by such institutions.

Amicus offers the following arguments with the hope that this presentation will assist this Court in interpreting Section 504 in accordance with the letter and the spirit of the Rehabilitation Act of 1973 as amended. (29 U.S.C. § 701 *et seq.* ("the Act").

First, in order to identify and eliminate misconceptions about abilities of handicapped persons, it is crucial that the key term in Section 504, "otherwise qualified", as applied to college admissions be interpreted to preclude disqualification of individuals because of handicap. Amicus believes this construction is mandated by the constitutional principles of equal protection and due process underlying the statute's intent. Futhermore, it is in the public interest that traditional notions about the suitability of handicapped persons for particular occupations not bar individuals access to any college programs. Suppose, for example, Beethoven had been prevented from composing music once his hearing became impaired.

Secondly, the duty not to discriminate imposed by the statute implies a corresponding duty to reasonably accommodate the special needs of handicapped persons in order to neutralize the effect of any disabling condition. A prohibition against discrimination in college admissions is meaningless if a student can't get through the door or have lecture materials translated into usable form.

[6]*Persons with Impaired Hearing United States* (1971) HEW Publication No. (HRA) 76-1528, p. 1.

Thirdly, Amicus suggests that, although the administrative procedures specified in the recently promulgated regulations and amendments to the Act should normally be exhausted prior to seeking judicial relief, an exception should be made for Ms. Davis.

ARGUMENT

I.

THE COURT OF APPEALS CORRECTLY CONSTRUED THE TERM "OTHERWISE QUALIFIED" TO PRECLUDE CONSIDERATION OF DAVIS' HANDICAP DURING THE ADMISSIONS PROCESS

A. The Court Of Appeal Was Correct In Remanding This Case In Light Of The Intervening Regulations.

The regulations of the Department of Health, Education and Welfare ("H.E.W."), promulgated to effectuate Section 504, make it clear that qualifications for post secondary education must be determined based on the applicant's academic and technical skills only. (45 C.F.R. § 84.3(k)(3).) Since the ability to hear is neither an academic nor technical skill essential to participation in the nursing program, the Fourth Circuit properly remanded the case in light of the applicable regulations which antedated the trial court's decision. (*United Handicapped Federation v. Andre* (8th Cir. 1977) 558 F.2d 413, 416.)

The entire scheme of the Section 504 regulations demonstrates that the trial court erred in focusing on Davis' hearing impairment during the admissions process. For example, section 84.42(4) provides that administrators of post secondary educational programs and activities, including post secondary vocational programs and activities, "may not make preadmission inquiry as to whether an applicant for admission is a handicapped person" except for purposes of taking remedial action to correct the effects of past discrimination. (45 C.F.R. § 84.42(4).) This prohibition applies to every form an applicant is asked to submit, including medical forms. After admission, inquiry may be made on a confidential basis as to handicaps that may require accommodation. (*Ibid.*)

Title 45 Code of Federal Regulations Section 84.43(c) provides:

> "A recipient to which this subpart applies may not, on the basis of handicap, exclude any qualified handicapped student from any course, course of study, or other part of its education program or activity."

H.E.W.'s analysis of regulation explains that:

> " . . . This paragraph is designed to eliminate the practice of excluding handicapped persons from specific courses and from areas of concentration because of factors such as ambulatory difficulties of the student or *assumptions by the recipient that no job would be available in the area in question for a person with that handicap.*" (45 C.F.R. § 84, Appendix A, p. 388, emphasis added.)

The College violated the letter and the spirit of the above regulations in evaluating Ms. Davis' application for admission to the nursing program. Unlike other applicants, she was subjected to a pre-admission special hearing test which was reviewed by the Director of the State Board of Nursing. The Director's opinion with respect to Davis' ability to serve as a Registered Nurse after graduation was the single major factor in the college's denial of her admission. (*Davis, supra,* 424 F. Supp. at 1343-1344.) This is exactly the type of disparate treat-

ment of handicapped persons section 504 was intended to eliminate. The regulations make it clear that the lower court "erred by considering the nature of Ms. Davis' handicap in order to determine whether she was 'otherwise qualified' for admittance to the nursing program." (*Davis, supra,* 574 F.2d at 1161.)

B. Principles Of Equal Protection And Due Process Should Be Considered In Construing Section 504.

Congress has found that "[i]t is of critical importance to this Nation that equality of opportunity, equal access to all aspects of society and equal rights guaranteed by the Constitution be provided to all individuals with handicaps." (88 Stat. 1631.) It is necessary to focus on an applicant's qualifications without regard to handicap to avoid invidious discrimination and to promote equal opportunity for handicapped persons. It is therefore pertinent to consider the constitutional policies embodied in the due process and equal protection clauses in interpreting Section 504. (See *Toth v. Quarles* (1955) 350 U.S. 11, 15.)

1. Stereotyping of Handicapped Persons Is Repugnant to Equal Protection Principles and Section 504.

The trial court found that the single major factor in the College's refusal to allow admission to Davis was "*their feelings* that she would be unable to serve as a Registered Nurse on completion of the program." (*Davis, supra,* 424 F. Supp. at 1346, emphasis added.) It should be noted in passing that their feelings do not appear to be founded on objective data or even a fair evaluation of Ms. Davis' potential to function as a Registered Nurse. Indeed,

hearing impaired and even deaf persons are currently employed in health care occupations.[7] Moreover college administrators' feelings regarding Davis' suitability to be a Registered Nurse are not strictly relevant to the issue of whether she is qualified for the college program. It must be emphasized that this is not an employment discrimination case; it is a discrimination in education case.[8] As pointed out above, colleges may not refuse admission based on an assumption that no job would be available in the area in question for a person with a handicap.

What is relevant, however, is that their feelings may be based on stereotyped notions about the suitability of handicapped persons for certain occupations. Such preconceptions are repugnant to the United States Constitution. Section 504 was obviously designed to overcome stereotyping of handicaped persons. Only by requiring that an applicant's qualifications be considered without regard to handicap, can discrimination because of stereotyping be overcome.

The petitioner urges that Section 504 be interpreted to "approve and perpetuate" a principle used by Mr. Justice Bradley in *Bradwell v. The State* (1872) 83 U.S. (16 Wall.) 130 to sanction such stereotyping. (Pet. Br. p. 30.) In *Bradwell,* Justice Bradley rationalized the refusal of a state to allow women to practice law as follows: "The

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[7]For example, the federal government currently employs over 300 persons with hearing impairments as nurses and as nursing assistants. (U.S. Civil Service Comm. Report, *Employment of Handicapped Individuals Including Disabled Veterans in the Federal Government,* September 30, 1978; see also, Owens, Redden and Brown, *Resource Directory of Handicapped Scientists,* AAAS Publication No. 78-13 for a listing of handicapped persons employed in various health care occupations.)

[8]The Bona Fide Occupational Qualification (BFOQ) type arguments asserted by petitioner, such as the blind bus driver, are therefore beside the point. (Pet. Br. pp. 40-41.)

natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life." (*Id.* at 141.) Fortunately this type of gross stereotyping, based on physical distinctions between the sexes, has been discredited. (See for example, *Frontiero v. Richardson* (1973) 411 U.S. 677, 684-685.)

Like women, handicapped persons have been traditionally subjected to discrimination because of immutable characteristics.[9] Many of this Court's criteria for determining what constitutes a suspect class for purposes of equal protection analysis apply to the handicapped who are "a class . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such position of political powerlessness as to command extraordinary protection from the majoritarian political process." (*San Antonio School District v. Rodriquez* (1972) 411 U.S. 1, 28; see also *Fialkowski v. Shapp* (E.D. Pa. 1975) 405 F. Supp. 946, 958-959, and *In Interest of G.H.* (N.D. 1974) 218 N.W. 2d 441, 446-447.)

It was with a sensitivity to the difficulty of overcoming ingrained societal discrimination against handicapped people that Congress fashioned the statute. As Senator Williams observed:

> "The handicapped live among us. They have the same hopes, the same fears, and the same ambitions as the rest of us . . . In their quest to achieve the benefits of society they ask no more than equality of opportunity. But they are faced with continuing discrimination.
>
> ". . . Most of us see the handicapped only in terms of stereotypes that are relevant for extreme cases. This ancient attitude is in part the result of historical separation of our handicapped population. We have isolated them so that they have become unknown to the communities and individuals around them." (118 Cong. Rec. 3320-3321 (1972) Remarks of Senator Williams.)

[9]See, Burgdorff and Burgdorff, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect" Class Under the Equal Protection Clause* (1975) 15 Santa Clara Lawyer 855.

To focus on the person's handicap under Section 504 would indeed "approve and perpetuate" the anachronistic assumptions relied on in the *Bradwell* case and by petitioner. Amicus urges that Section 504 be interpreted in accordance with equal protection policies.

2. Due Process Principles Are Relevant to Interpreting Section 504.

a. The Liberty to Pursue One's Chosen Occupation Is A Significant, If Not Fundamental Interest.

As early as 1915 this Court declared that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." (*Truax v. Raich* (1915) 239 U.S. 33, 41; see also *Yick Wo v. Hopkins* (1886) 118 U.S. 356, 369; and *Takahashi v. Fish Comm'n* (1948) 334 U.S. 410, 416.)

Ms. Davis has not only been denied the opportunity to pursue her chosen occupation solely because of her handicap, she has been denied the opportunity to become

educated in that field. The importance of education has been often recognized by this Court. (*See e.g., Brown v. Board of Education* (1954) 347 U.S. 483, 493 and subsequent cases.) The liberty of the handicapped to pursue these two significant interests depends upon a proper construction of Section 504.

b. Due Process Disfavors General Assumptions of Physical Inability to Perform A Job.

Ms. Davis was rejected for the nursing training program because of her handicap without having been afforded an opportunity to prove that she could perform, the assumption being that deaf and hearing impaired people cannot perform as nurses. But as pointed out at note 7, *supra,* hearing impaired and even deaf people can and do function as nurses. Ms. Davis has qualified as a practical nurse for many years (*Davis, supra,* 424 F. Supp. at 1342); even petitioner admitted she would be able to perform adequately in some nursing positions. (*Id.* at 1346.)

In *Cleveland Board of Education v. La Fleur* (1974) 414 U.S. 632, this Court invalidated presumptions that pregnant women and women who have recently given birth are physically incapable of teaching school. Likewise in *Gurmankin v. Castanzo* (E.D. Pa. 1976) 411 F. Supp. 982, the trial court found that the school district's refusal to consider blind persons to be teachers for sighted students violated the plaintiff's due process rights. (*Id.* at 991-992.)

As were the plaintiffs in *La Fleur* and *Gurmankin,* Ms. Davis has been denied the opportunity to demonstrate her ability to do a job because of general assumptions about her physical disability. Due process principles require that Ms. Davis' qualifications be assessed without regard to her handicap so that she can be afforded an equal opportunity to demonstrate her abilities.

II.

REASONABLE ACCOMMODATION IS CONCOMITANT WITH THE DUTY NOT TO DISCRIMINATE ON THE BASIS OF HANDICAP

A. The Concept of a Duty To Accommodate Is Incorporated Into Section 504.

It is not entirely accurate to characterize the duty to accommodate imposed under Section 504 as "affirmative action." (See Pet. Br. pp. 47-56.) The phrase connotes a system of preferential admissions for handicapped persons, for which there is little evidence Congress intended to require under Section 504. There is, for example, no requirement in H.E.W.'s regulations that institutions of higher education establish goals or quotas for the admission of handicapped students. Certainly no one has suggeted that colleges must reduce their academic standards for such persons. Thus the charge that the appellate court's decision infringes upon academic freedom is wholly spurious. (Pet. Br. p. 56.)

A full and fair reading of the statute, regulations and commentary can lead only to the conclusion that the goal of the positive duty imposed under Section 504 is to simply neutralize the handicapping condition in order to allow equal competition.

That Congress has always intended reasonable accommodation to be part of the regulations issued by H.E.W. is apparent from the committee commentary.[10] For example, the Senate report submitted in connection with the 1974 amendments to the Act specifies that "[w]here

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[10]The subsequent and contemporaneous comments of Congress to the enactment of a provision may properly be considered in reaching a conclusion as to the meaning Congress wished to attach to a statute. (*Red Lion Broadcasting Co. v. FCC* (1968) 395 U.S. 367; *Algoma Plywood Co. v. Wis. Board* (1948) 336 U.S. 301.)

applicable, Section 504 is intended to include a requirement of affirmative action as well as a prohibition against discrimination." (1974 U.S. Code, Cong. & Admin. News, p. 6390, Senate Report on Pub.L. No. 95-516), and demonstrates the long reach Congress intended the statute to have. The absence of any attempt by Congress to restrict the positive duties described in H.E.W.'s regulations is further evidence of its intention to impose such obligations on colleges. Clearly, Congress had the opportunity while considering the 1978 amendments to the Act to limit the effect of the regulations. Congress did limit the scope of affirmative conduct it chose to impose on the federal government as an employer, but did not limit the scope of the Section 504 regulations.[11]

H.E.W.'s analysis of the regulations make it clear that reasonable accommodation to the needs of individual students is required by Section 504. For example, the analysis of Title 45 Code of Federal Regulations section 84.44(a) provides:

> "Paragraph (a) of § 84.44 requires that a recipient make certain adjustments to academic

[11]Considerable debate attended consideration of the 1978 amendments in the House of Representatives. However, not one comment can be found in the record even so much as intimating that H.E.W. had exceeded its authority by requiring "reasonable accommodation" under Section 504.

To the contrary, during the Senate debates over the 1978 amendments, a great deal of criticism was leveled at the broad accommodation duty formerly required by what is now Section 501 of the Act. Senator McClure introduced two amendments to limit the scope of accommodation required by the federal government as an employer. The debate clearly underscored the Senators' understanding of the duty of reasonable accommodation, generally and specifically under Sections 501 and 503 of the amended Act. Yet, no effort was made to further restrict the regulations issued by H.E.W., except as to employment. (124 Cong. Rec. 15664-15667 (1978).)

> requirements and practices that discriminate or have the effect of discriminating on the basis of handicap. This requirement, like its predecessor in the proposed regulation does not obligate an institution to waive course or other academic requirements. *But such institutions must accommodate those requirements to the needs of individual handicapped students.*" (Emphasis added.) (45 C.F.R. § 84, Appendix A, p. 388.)

B. Judicial Decisions Support The Requirement of Reasonable Accommodation.

Several lower courts have found that Section 504 incorporates a duty to accommodate. In *Lloyd v. Illinois Regional Transportation Authority* (7th Cir. 1977) 548 F.2d 1277, the Seventh Circuit found that Section 504 and the regulations pursuant thereto placed an affirmative duty on the mass public transportation system to refrain from designing or placing into operation any new federally funded facilities unless the facilities were accessible to all mobility-disabled persons. The court held that Section 504 establishes "affirmative rights" (*Id.* at p. 1285) and remanded to the district court to review what relief could have been afforded the handicapped plaintiff class. (*Id.* at pp. 1287-88.)

Similarly, in *United Handicapped Federation v. Andre, supra,* 558 F.2d 413, the Eighth Circuit, citing *Lloyd,* held that the transit commission, which had purchased new buses with federal aid, had the burden of taking affirmative action to conform to regulations and guidelines requiring that such mass transit equipment be made fully accessible to all handicapped persons, pursuant to Section 504. The financial burden upon the recipient did not prelude a finding in keeping with the Act. "Although the buses in question have been purchased and placed in

service, because of recent developments [subsequent promulgation of H.E.W. guidelines] the defendants now have the burden to take affirmative action to conform to the regulations and guidelines." (*Id.* at p. 416.)

In *Hairston v. Drosick* (S.D. W.Va. 1976) 423 F. Supp. 180, the district court for the Southern District of West Virginia held that the exclusion of a minimally handicapped child from the regular public classroom without a bona fide educational reason is a violation of Section 504. The court concluded that "[t]o deny to a handicapped child access to a regular public school classroom in receipt of federal financial assistance without compelling educational justification constitutes discrimination and a denial of the benefits of such program in violation of the statute. School officials must make every effort to include such children within the regular public classroom situation, *even at great expense to the* school system." (*Id.* at p. 184.)

Barnes v. Converse College (D. S.C. 1977) 436 F. Supp. 635 and *Crawford v. University of North Carolina* (M.D. N.C. 1977) 440 F. Supp. 1047 were actions under Section 504 which required federally funded private colleges to provide and pay for interpreters for deaf students.

In *Barnes,* plaintiff was a deaf English teacher who was required by the State Department of Education to earn additional college units to maintain an "out-of-field" permit to teach in the public schools. Plaintiff required an interpreter to participate in classroom activities and sought to have the college provide funds for such interpreter. The court found that plaintiff had a "probable right" under which she could recover and that "refusal to grant plaintiff relief . . . would defeat any rights she may have . . . and would cause her immediate and irreparable injury in the form of loss of employment." (*Barnes, supra,* 436 F.2d at 638.) The *Barnes* court, while sympathetic to the cost factor, observed that "the danger of future expenditures under this statute is not a proper consideration in this lawsuit." (*Ibid.*)

Similarly, in *Crawford*, the court held that a state supported university was required to provide a deaf graduate student with the services of an interpreter. After balancing the financial burdens to both parties, the court held that it had "no doubt that the University would be better able to pay the costs." (*Crawford, supra,* 440 F. Supp. p. 1059.)

In conclusion, the duty to reasonably accommodate imposed upon recipients under Section 504 is an affirmative right of the handicapped. Specific cost factors might be considered in connection with the factual question of what is reasonable accommodation by the district court on remand, but they are not pertinent to the issue before this Court: whether Section 504 imposes a duty of reasonable accommodation.[12]

III.
A PRIVATE RIGHT OF ACTION IS INTENDED UNDER SECTION 504

The issue of whether there is a private right to seek legal redress under Section 504 has occasioned lengthy comment in the briefs of petitioner and the *amici curiae*

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[12]The court's *de minimus* interpretation of the duty to accommodate to the religious practices and beliefs of an employee in *Trans World Airlines v. Hardison* (1977) 432 U.S. 63, is not analogous to a college's duty to accommodate to a student's physical handicap under Section 504. (See *Holland v. Boeing Co.* (Wash. S.C. 1978) 18 FEP 37, a case arising under a Washington state law involving a cerebral palsy employee where the *de minimus* effort test was not applied.)

supporting petitioner.[13] Some confusion has resulted from these arguments, especially where analogies to employment discrimination against handicapped persons have been drawn. We reiterate and cannot state too strongly that the case before the bar is not an employment discrimination case.

A. Congress Has At All Times Intended A Private Right Of Action Under Section 504.

It is clear that a private right of action under Section 504 has always been contemplated by Congress. In order for this Court to reach a just result in this matter, the issue of a private right of action should be considered in two steps. The first consideration being the status of the private right as currently established in the law; the second, the status of the private right at the time Davis commenced her action in the district court.

In order to fully appreciate the view taken below, consideration should be given the remedial character of the Act and the 1978 amendments. The clear purpose of Congress in 1973 is stated in Title 29 United States Code section 701, which lists various goals sought to be accomplished, each directed at improving, assisting or in some manner providing for the needs of handicapped persons.[14] The comments in the House Report on the

[13]Amici C. Br. of 32 States, pp. 23-27; Pet. Br. pp. 61-62.

[14]29 U.S.C. § 701 states in full:

The purpose of this chapter is to provide a statutory basis for the Rehabilitation Services Administration, and to authorize programs to —

> "(1) develop and implement comprehensive and continuing State plans for meeting the current and future needs for providing vocational rehabilitation services to handicapped individuals and to provide such services for the benefit of such individuals, serving first those with the most severe handicaps, so that they may prepare for and engage in gainful employment;
>
> "(2) evaluate the rehabilitation potential of handicapped individuals;
>
> "(3) conduct a study to develop methods of providing rehabilitation services to meet the current and future needs of handicapped individuals for whom a vocational goal is not possible or feasible so that they may improve their ability to live with greater independence and self-sufficiency;
>
> "(4) assist in the construction and improvement of rehabilitation facilities;
>
> "(5) develop new and innovative methods of applying the most advanced medical technology, scientific achievement, and psychological and social knowledge to solve rehabilitation problems and develop new and innovative methods of providing rehabilitation services to handicapped individuals through research, special projects and demonstrations;
>
> "(6) initiate and expand services to groups of handicapped individuals (including those who are homebound or institutionalized) who have been underserved in the past;
>
> "(7) conduct various studies and experiments to focus on long neglected problem areas;
>
> "(8) promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment;
>
> "(9) establish client assistance pilot projects;
>
> "(10) provide assistance for the purpose of increasing the number of rehabilitation personnel and increasing their skills through training; and
>
> "(11) evaluate existing approaches to architectural and transportation barriers confronting handicapped individuals, develop new such approaches, enforce statutory and regulatory standards and requirements regarding barrier-free construction of public facilities and study and develop solutions to existing architectural and transportation barriers impeding handicapped individuals."

1978 amendments stated that the purpose was to ". . . extend and strengthen programs authorized under the

Rehabilitation Act of 1973 . . . . " (1979 U.S. Code and Admin. News at p. 7490.)

Moreover, civil rights legislation is generally considered remedial in nature and, as such, provisions like Section 504 should be construed liberally in order to reach the goals sought by the Legislature. (*Ham v. Rock Hill* (1964) 379 U.S. 306.) In analyzing Section 504, this principle suggests that a private right of action was intended to enforce the right of nondiscrimination specified by Congress.

The Senate Report on the 1974 amendments to the Act are particularly compelling with respect to Congressional intent to afford a private right of action under the statute. The report discusses the history and intent of Congress as to Sections 503 and 504 at length, stating in part:

> "Section 504 was patterned after, and is almost identical to the anti-discrimination language of Section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1, and Section 901 of the Education Amendments of 1972, 42 U.S.C. 1683. This Section therefore constitutes the establishment of a broad governmental policy that programs receiving federal financial assistance shall be operated without discrimination on the basis of handicap. It does not specifically require the issuance of regulations or expressly provide for enforcement procedure, *but it is clearly mandatory in form, and such regulations and enforcement were intended.*" (Emphasis added.)

The report continues, stating:

> "This approach to implementation of Section 504, which closely follows the models of the above-cited anti-discrimination provisions, would ensure administrative due process . . . as well as relative ease in implementation, and *permit a judicial remedy through a private action.*" (1974 U.S. Code, Cong. & Admin. News, at pp. 6390-6391, emphasis added.)

The 95th Congress has further strengthened the right to a private judicial remedy under Section 504 and continued to act in a manner consistent with the above quoted remarks. The 1978 amendments to the Act, especially the addition of Section 505(b), which empowers the courts to " . . . allow the prevailing party, other than the United States, a reasonable attorney's fee as part of costs" (1979 U.S. Code Cong. and Admin. News at pp. 2982-2983, Pub.L. 95-602), can only be read to mean that implicit within Section 504 is the right of an aggrieved person to seek judicial redress.

The affirmance of the private right of action as indicated above is tempered somewhat however, by the amendments' provisions found in Section 505(a)(2), which limit one's remedies, procedures and rights to those accorded under Title VI of the 1964 Civil Rights Act. (42 U.S.C. 2000d; see also, 45 C.F.R. §§ 80 *et seq.*, 45 C.F.R. §§ 81 *et seq.*) (*Ibid.*) Thus, a private judicial remedy is clearly intended under Section 504, but only after an administrative investigation, review, and hearing process.

The foregoing discussion is important in this case, but in a limited sense. Ms. Davis brought this action prior to the effective date of the 1978 amendments to the act, and even before H.E.W.'s regulations went into effect on June 3, 1977. (42 Fed.Reg. 22677, May 4, 1977; *Davis, supra,* 574 F.2d at 1163, n.9.) This means that there was neither any express statutory acknowledgment by Congress that a private right would lie, nor was there any adminstrative

scheme by which Davis could seek relief. The questions most squarely before this Court then are whether Davis had a private right to bring the instant action prior to the 1978 amendments to the Act and whether she should now be be barred or forced to start all over because of her failure to exhaust a then nonexistent administrative remedy.

B. Davis Had A Right To Bring A Private Action Prior To The 1978 Amendments To The Act.

As set forth above, Section 504 should be accorded a liberal interpretation in order to implement the goals sought and eradicate the evil addressed by Congress. Moreover, based solely upon the history of Section 504, it is consistent and logical to find that a private right of action exists. Petitioner's argument that Congress never intended to allow private persons to enforce Section 504, or at least not until regulations were promulgated, defies logic. It is beyond belief that Congress would offer Section 504 to handicapped persons as at best an empty promise of non-discrimination.

Should this Court find the above insufficient to establish a private right to sue, amicus believes the *Cort v. Ash* (1974) 422 U.S. 66 analysis employed by the Court of Appeal in *Lloyd v. Regional Transportation Authority, supra,* 548 F.2d 1277, is most persuasive.

The *Cort* analysis applies to this case as follows: First, Davis is clearly a handicapped person within the meaning *of Title 29 United States Code sections 706(b) and 794. (Davis, supra,* 424 F. Supp. at 1345.) Second, there is express legislative intent that a private remedy be granted individuals. (As noted in *Lloyd, supra* at 1285-1286, Congress clearly intended judicial enforcement of Section 504, *albeit* in a post-administrative hearing context.) Third, as observed in *Lloyd,* it is not unreasonable to

imply a remedy from the terms of the statute. The last consideration in the *Cort* test is whether the area which Davis seeks to enforce is traditionally relegated to state law. This was of concern in *Cort* because of the state's long history of adjusting rights between corporate directors and stockholders, the topic in that case. (*Cort, supra,* at 68, 84.) There is no parallel in the instant case. The federal judiciary has a well known interest in protecting the civil rights of individuals and has not hesitated to do so in circumstances such as these. The provisions which Davis seeks to assert are merely a younger generation of a long-established federal policy.

C. Davis Should Not Be Required To Exhaust An Administrative Remedy Which Did Not Exist At the Time She Filed This Action.

The lower courts found that it would have been futile for Davis to process her grievance further with the College. Since she filed this action however, a scheme for processing such complaints with H.E.W. has been promulgated.

The decision in *Cort, supra,* was limited by the instance of an intervening statutory and regulatory change, similar to that occurring in this case (implementation of the H.E.W.'s regulations and the 1978 amendments to the Act). (*Cort, supra,* at 74-76). This Court noted that a change in law which occurs while a case is on appeal should be considered by the reviewing court. (*Cort, supra,* at 76-77, citing *United States v. The Schooner Peggy* (1801) 5 U.S. (1 Cranch) 103.) If applied in this case, this rule would require Davis to start anew by filing an administrative complaint, awaiting the results, and then if the results are unfavorable, filing a private action in the district court. Such a procedure would be manifestly unjust and wasteful.

Amicus believes the exception to *The Schooner Peggy*

rule, acknowledged by this court in *Bradley v. Richmond School Board* (1974) 416 U.S. 696, is appropriate in this instance. In *Bradley,* this court observed that when an intervening change in law would cause a manifest injustice, and certain other elements were present, a court should not apply the change in the law. (*Id.* at 716; see also *Thorpe v. Housing Authority* (1969) 393 U.S. 268; *Greene v. United States* (1964) 376 U.S. 149.) Elements that should be considered in applying the exception include: (a) the nature and identity of the parties; (b) the nature of their rights; and (c) the nature of the impact of the change in law upon these rights. (*Bradley, supra,* 416 U.S. at 717.)

In *Bradley,* the litigation took place between a school board and class of minority children to establish the rights of the entire class. The court noted the vast resources of the school board which contended that applying an intervening change in the law relating to attorney's fees would be unjust. (*Id.* at 718.) The instant case is a matter of private litigation to adjust the rights of an individual, Davis. The expense and delay for Davis, should she be required to commence this matter anew, can only be considered very burdensome.

The second element of the exception is not wholly applicable to this case and should be viewed as neutral. In *Bradley,* the court considered whether injustice would occur by infringing upon a right that had matured or become unconditional. (*Id.* at 720.) Neither party in this matter has any right which is presently matured such that application of the exception would injure either side.

The third *Bradley* consideration is whether by allowing the exception, a new and unanticipated obligation would be placed upon a party without an opportunity to be heard. (*Id.* at p. 720.) Clearly, remand of this case to the district

court places no additional burden on the College. The College would bear the same burden if it had to justify its actions before an administrative tribunal.

Furthermore, the application of the exception would be narrow and limited to the facts of this case, where a private action is commenced prior to promulgation of an administrative scheme. Claims arising under Section 504 since the effective date of the regulations, June 3, 1977, should adhere to the format of administrative investigation, hearing, and judicial review, set forth in the regulations and 1978 amendments to the Act,[15] since Congress clearly intended that the now-available comprehensive administrative remedy be pursued wherever possible. (1979 U.S. Code Cong. and Admin. News, at 6390-6391; Pub.L. 95-602, § 505(a)(2).)

CONCLUSION

For the foregoing reasons, Amicus respectfully urges that the Court of Appeal's decision be affirmed.

Respectfully submitted,

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[15]Amicus believes that this case represents a narrow exception to the requirement of exhaustion of administrative remedies. But for the foot dragging of H.E.W., the issue of the right to sue presented by *Davis* would not have occurred and the problems presented by this case may have been avoided. (See, 1974 U.S. Code, Cong. and Admin. News at p. 6391, Senate Report on Pub.L. 93-516, and *Cherry v. Mathews* (D. D.C. 1976) 419 F. Supp. 922.)